it will be rapidly impaired in value by delay. Second-hand machinery never brings more than a small percentage of its cost; and delay would be more likely to diminish than to increase the market value of the property under consideration. There was no upset bid, and no evidence of any kind that another offer would bring a better price.

Upon the whole case, we are of opinion that the decree appealed from should be affirmed, and the cause remanded to the lower court for further proceedings in accordance with this opinion.

KECOUGHTAN LODGE, No. 29, K. P., *v.* STEINER & KAUFMAN.

March 14, 1907.

[56 S. E. 569.]

1. Exceptions, Bill of—Evidence—Identification.—Defendants' first bill of exceptions recited that "after the jury had heard all the evidence, which is set out in bill of exceptions No. 2 (to which reference is hereby made), which was all of the testimony in the case, counsel for defendants tendered the following instruction," etc. The stenographer's report of the evidence was indorsed by counsel representing both parties as a correct copy, was signed by the trial judge, and was securely attached to the bill of exceptions by paper fasteners. Held, that the bill and evidence were so articulated as to form one paper, and the bill therefore sufficiently identified the evidence referred to.

[Ed. Note—For cases in point see Cent. Dig. vol. 21, Exceptions, Bill of, § 14.]

2. Writ of Error—Refusal of Requests—Review—Record.—Where the record on a writ of error did not show what prayers were granted by the court, the refusal of a requested instruction could not be reviewed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2938.]

3. Landlord and Tenant—Defective Premises—Water Pipes—Control.—Where a landlord furnished water-closets on the various floors of his building, which were in charge of his janitor, and plaintiffs, the tenants on the first floor, had no duty to perform with reference thereto, the landlord was responsible for injuries to plaintiffs' goods, caused by an overflow resulting from the bursting of the pipes by freezing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 651.]

Error to Circuit Court, Elizabeth City County.

Action by Steiner & Kaufman against Kecoughtan Lodge No. 29, Knights of Pythias. From a judgment for plaintiffs defendants bring error. Affirmed.

John F. Weymouth and *Jones & Woodward,* for plaintiffs in error.

F. S. Collier & Son and *J. W. Friend,* for defendants in error.

WHITTLE, J. The defendants in error (who were dry goods merchants) occupied one of the storerooms on the ground floor of a large three-story building in the town of Hampton, known as the "Pythian Castle," as tenants of the plaintiffs in error. The building was equipped with water pipes, and furnished with water-closets on the second and third floors. During a period of exceptionally cold weather, in January, 1905, in the nighttime, a pipe conducting water to the closet on the second floor burst from freezing, and the water flowed from the broken pipe into the storeroom of the defendants in error below, causing injury to their stock of goods. Thereupon they brought this action to recover damages for the loss sustained. There was a verdict and judgment for the plaintiffs, to which judgment this writ of error was allowed.

Objection is raised by the defendants in error in the outset to the consideration of the stenographic report of the evidence on the ground that it is not sufficiently identified to constitute part of the record.

The defendants' first bill of exceptions recites that "after the jury had heard all the evidence, which is set out in bill of exceptions No. 2 (to which reference is hereby made), which was all the testimony in the case, counsel for the defendants tendered the following instruction * * *"; and bill of exceptions No. 2 reads: "Be it remembered that on the trial of this case, after the jury had brought in their verdict, in the words and figures following, to wit: 'We, the jury, find for the plaintiffs, and assess their damages at $475'—the defendants, by counsel moved the court to set aside the said verdict and grant the defendants a new trial, on the ground that the said verdict was contrary to the law and the evidence, which said evidence, as certified by the court, is in the following words and figures, to wit." From an inspection of the original record, brought up on certiorari, it appeared that the stenographic report of the evidence was indorsed by counsel representing both plaintiffs and defendants as a correct copy, signed by the trial judge, and securely attached to the bill of exceptions by paper fasteners.

We are of opinion that the bill of exceptions and report of the evidence were so articulated as to form one paper, thus sufficiently

identifying the evidence referred to in the bill of exceptions. See Jeremy Imp. Co. *v.* Commonwealth (Va.) 56 S. E. 225; Leftwitch *v.* Lecanu, 4 Wall. (U. S.) 187, 18 L. Ed. 388.

The foregoing are the only bills of exceptions in the case. The first is to the refusal of the court to give an instruction at the instance of the defendants. This assignment cannot be availed of here, because the record does not show what prayers were granted by the court, and consequently the rejected instruction may have been covered by other instructions in the case. Rocky Mt. Trust Co. *v.* Prict, 103 Va. 298, 49 S. E. 73; Stevenson *v.* Levinson, 103 Va. 592, 49 S. E. 974.

The second exception is to the action of the court in overruling the motion of the defendants to set aside the verdict of the jury as contrary to the law and evidence.

The written lease contains no stipulation in regard to the duty of cutting off water to prevent damage from the freezing of water pipes, and two opposing theories as to where that duty lay were submitted to the jury upon the evidence. The evidence on behalf of the plaintiffs tended to show that, while they were permitted in common with other tenants to use the water-closet on the second floor, the building was in charge of a janitor employed by the defendants, whose exclusive business it was to keep the water pipes in repair and to cut off the water on the upper floors; that the plaintiffs had no duty to perform in that regard, or control of the water supply for the building outside of the storeroom which they occupied; that water could be cut off from the entire building by means of a stopcock key, which was applied on the street outside, but that they had no authority to use it and deprive tenants of other parts of the building of water. They illustrated their contention by narrating an incident which occurred several years prior to the present accident. While they were in possession of the storeroom in question under the same lease, their goods were injured from a similar cause, whereupon the defendants not only admitted their liability by paying damages, but also promised to have the water pipes looked after in the future.

The countervailing evidence of the defendants is that the janitor had no supervision of this water-closet, but that it was set apart for the use and placed under the exclusive control of the occupants of the second floor and storerooms on the lower floor, and that it was the duty of the plaintiffs and others who used the closet to attend to cutting off the water.

They rely strongly upon the case of Buckley *v.* Cunningham, 103 Ala. 449, 15 South. 826, 49 Am. St. Rep. 42. In that case it was proved that the lessee had as much control over the water pipes as the lessor, and the court told the jury,

as matter of law, that the landlord was not liable; there being no claim that the pipe itself was defective or not put in properly. In other words, upon familiar principles, the tenant was clearly not entitled to recover for an injury occasioned by the joint negligence of himself and the landlord. The latter might with equal propriety have demanded compensation from the tenant for damage to the building.

But in this case the jury accepted the theory of the plaintiffs and rejected the defendants' assumption of joint control.

The doctrine which obtains in this class of cases is correctly stated in 3 Farnham on Waters & Water Rights, at section 966, as follows: "If the injury is caused by leakage from pipes in other portions of the building than that occupied by the injured tenant, the question of the landlord's liability will depend upon his connection with the injury. He is liable for all injuries resulting from his own negligence, and an exemption clause in the lease will not include such injury. So a landlord is not relieved from liability for injury to tenants of a lower floor by the freezing and bursting of an automatic fire extinguisher in the portion of the building retained by him, by the fact that he has employed an independent contractor to keep the building heated. And the lessor is also liable for injuries caused by the negligent acts of his agents."

Viewing the case, as we must view it, from the standpoint of a demurrer to the evidence, the finding of the jury upon the issues of fact submitted to their determination is conclusive, and the judgment must be affirmed.

Note.

Where water is brought into the building for the use of the several tenants, the landlord must use reasonable care in the construction of the waterworks, so as to prevent injury thereby to the tenants. Citron *v.* Bayley, 36 N. Y. App. Div. 130. See also, Tennant *v.* Hall, 27 N. Bruns. 499 (a case of drainage pipes). But negligence cannot be inferred from the mere fact that the landlord did not place in the building the best kind of water-closet known at the time. Bernard *v.* Reeves, 6 Wash. 424. It seems that the same principle applies where the landlord was negligent in keeping in repair the water pipes common to the tenants in the building. Blake *v.* Woolf (1898), 2 Q. B. 426; Leonard *v.* Gunther, 47 N. Y. App. Div. 194. And see Gallagher *v.* Button, 73 Conn. 172. But compare Simons *v.* Seward, 54 N. Y. Super. Ct. 406. The principle of Rylands *v.* Fletcher, L. R. 3 H. L. 330, affirming L. R. 1 Exch. 165, was distinguished in Blake *v.* Woolf (1898), 2 Q. B. 426, on the ground that the tenant must be taken to have assented to water being kept on the premises by the landlord, and in Tennant *v.* Hall, 27 N. Burns. 499, on the ground that the apparatus for carrying off the water was as much for the benefit of the tenant as for the landlord. See also, Carstairs *v.* Taylor, L. R. 6 Exch. 217.

In New York it seems now to be settled that when water pipes are arranged for an entire building, parts of which are rented to dif-

ferent tenants, it is the duty of the landlord to keep the pipes in repair, or the failure to repair may amount to a constructive eviction. West Side Sav. Bank *v.* Newton, 76 N. Y. 616, 57 How. Pr. (N. Y.) 152; Vann *v.* Rouse, 94 N. Y. 401; Tallman *v.* Murphy, 120 N. Y. 352; Fitch *v.* Armour, 59 N. Y. Super. Ct. 413. In Massachusetts it has been held, that a landlord is under no implied obligation to keep in repair water pipes used exclusively in carrying water to the portion of the building demised to the tenant, and therefore is not liable to such tenant for damages from leakage from such pipes. McKeon *v.* Cutter, 156 Mass. 296, 31 N. E. 389.

Where reasonable care is used by the landlord in keeping the water pipes or works in repair, he incurs no liability for injuries to the tenant from accidental defects. Anderson *v.* Oppenheimer, 5 Q. B. D. 602; Carstairs *v.* Taylor, L. R. 6 Exch. 217; Blake *v.* Woolf (1898), 2 Q. B. 426; Tennant *v.* Hall, 27 N. Bruns. 499; Buckley *v.* Cunningham, 103 Ala. 449, 49 Am. St. Rep. 42; Greene *v.* Hague, 10 Ill. App. 598; Bernhard *v.* Reeves, 6 Wash. 424.

When the plumbing is properly constructed, the landlord is under no liability to one tenant for the negligent use of the waterworks by another tenant, Haizlip *v.* Rosenberg, 63 Ark. 430; White *v.* Montgomery, 58 Ga. 204; Freidenburg *v.* Jones, 63 Ga. 612; Greene *v.* Hague, 10 Ill. App. 598; Mendel *v.* Fink, 8 Ill. App. 378; McCarthy *v.* York County Sav. Bank, 74 Me. 315, 43 Am. Rep. 591; Allen *v.* Smith, 76 Me. 335; Kenny *v.* Barns, 67 Mich. 336; Leonard *v.* Gunther, 47 N. Y. App. Div. 194; Pigeon *v.* Roussin, 4 Montreal Leg. N. 326, as one tenant cannot be regarded in the use of such waterworks as the servant or agent of the landlord. Mendel *v.* Fink, 8 Ill. App. 378. If, however, the waterworks are retained under the control of the landlord, and their condition amounts to a nuisance, the landlord is liable to a tenant of a part of the building for injuries arising therefrom, though the abuse of the waterworks rendering them a nuisance was by other tenants of the building. Marshall *v.* Cohen, 44 Ga. 489, 9 Am. Rep. 170.

The parties may, by express agreement, exempt the lessor from liability for injuries to the tenant from the bursting of water pipes on the part of the building not demised to the tenant. Taylor *v.* Bailey, 74 Ill. 178; Fera *v.* Child, 115 Mass. 32; Sonn *v.* Weissmann, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 622, affirming (N. Y. City Ct. Gen. T.) 58 N. Y. Supp. 1149.

The landlord cannot be held liable to the tenants of a building for injuries caused through the negligent use by a stranger of the waterworks in the portion of the building retained under the landlord's control. Rosenfield *v.* Newman, 59 Minn. 157.

The landlord of a building is liable for injury to the goods of a subtenant by water which the janitor in the employ of the landlord negligently permitted to escape from a washbasin in the building. "The janitor whose negligence caused the second overflow was the servant of the defendant, and his negligence was in the course of his employment." Pike *v.* Brittan, 71 Cal. 159, 60 Am. Rep. 527.